(2)

Supreme Court, U.S.
FILED
DEC 18 1997
CLERK

No. 97-823

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

NANCY GRACIA,

Petitioner,

v.

VOLVO EUROPA TRUCK, N.V.,
a foreign corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT VOLVO EUROPA TRUCK, N.V. IN OPPOSITION

WAYNE F. PLAZA
CHARLES A. LEMOINE
Counsel of Record
ROOKS, PITTS AND POUST
10 South Wacker Drive
Suite 2300
Chicago, Illinois 60606
(312) 876-1700

Attorneys for Respondent

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

47 pp

QUESTION PRESENTED

Whether the Seventh Circuit Court of Appeals correctly decided that Petitioner's personal injury claim against Volvo for an alleged defective truck windshield retention design was preempted by the National Highway Transportation Safety Administration and the National Traffic and Motor Vehicle Safety Act, Standard 212, which regulated windshield retention in the subject truck, in accord with the principles and holding expressed by this Court in *Freightliner Corp. v. Myrick,* 514 U.S. 280, 115 S. Ct. 1483 (1995).

RULE 29.6 STATEMENT

Respondent Volvo Europa Truck, N.V., a corporation organized and existing under the laws of Belgium, is a wholly owned subsidiary of A.B. Volvo whose shares are traded on a public foreign exchange. Other major subsidiaries, affiliates and non-wholly owned subsidiaries of A.B. Volvo include:

AB O Annerstedt

BCP Group

Export Tool & Welding, Ltd.

Forsakingsaktielbolaget Volva

Volvo-Auto Ab

Prevost Bus, Ltd.

Society Franco-Cedes de Madeiras-PR.

Steyr Bus Gsmbh

Swedish Motor Assemblies Sdn. Bhd.

Thai-Swedish Assembly Co. Ltd.

VL Bus Asia (Pte) Ltd.

Volvo Australia Pty. Ltd.

Volvo Automobile (Schweiz) AG

Volvo Automobiles France S.A.

Volvo Bedrijfswagens B.V.

Volvo Cars Europe Marketing NV

Volvo Cars Intercontinental AB

Volvo Distribuidora S.A.

Volvo Group Insurance Forsakrings AB

Volvo Hydraulics Corporation

Volvo Italia SpA

Volvo Japan Corporation

Volvo Lastebiler og Busser Norge AS

Volvo Lastvagner Sverige AB

Volvo Norge A/S

Volvo North America, Inc.

Volvo Nutzfahreuge Deutschland GmbH

VME Group NV

VME Industries NA

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

BRIEF FOR THE RESPONDENT IN OPPOSITION 3

STATEMENT OF THE CASE 7

REASONS FOR DENYING THE PETITION 10

I. The Seventh Circuit Followed And Correctly Applied *Myrick* 10

II. There Is No Conflict In The Lower Courts Over The Question Of Whether FMVSS 212 Preempts Windshield Retention Claims In Forward Control Trucks Over 10,000 Pounds 17

III. The Petition Presents No Reason For This Court To Depart From Its Prior Decisions Holding That Common Law Claims Are Subject To Federal Preemption 22

CONCLUSION 27

APPENDIX A—FMVSS 212 . . . . . A-1

15 U.S.C. § 1392(d) A-4

15 U.S.C. § 1397(k) A-4

APPENDIX B—Photographs B-1

APPENDIX C—Seventh Circuit Court of Appeals order denying rehearing *en banc* C-1

TABLE OF AUTHORITIES

Cases: PAGE(S)

Asahi Metal Indus. Co. v. Superior Court of California, 480 U.S. 102 (1987) 23

Attocknie v. Carpenter Manufacturing, Inc., 901 P.2d 221 (Okla. App. Ct. 1995) 19

Boyle v. Chrysler Corp., 501 N.W.2d 865 (Wis. Ct. App. 1993) 19

Cannon v. Commonwealth Edison Co., 621 N.E.2d 52 (Ill. App. Ct. 1993), *appeal denied* 6

Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) . . . . . *passim*

Clark v. Penn Versatile Van, 554 N.E.2d 643 (Ill. App. Ct. 1990) 6

Cooper v. General Motors Corp., 1997 WL 751947 (Miss. 1997) 17, 18

CSX Transportation v. Easterwood, 507 U.S. 658 (1993) 23, 25

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) 5

Doyle v. Volkswagenwerk AG, 114 F.3d 1134 (11th Cir. 1997) 18

Freightliner Corp. v. Myrick, 514 U.S. 280 (1995) . . . . . *passim*

Gracia v. Volvo Europa Truck, N.V., 112 F.3d 291 (7th Cir. 1997) . . . . . *passim*

Harris v. Ford Motor Co., 110 F.3d 1410 (9th Cir. 1997) 18, 19

In Re: Ford Motor Co. Bronco II Products Liability Litigation ("Bronco II"), 909 F. Supp. 400 (E.D. La. 1995) 19, 20

Ingersol Rand Co. v. McClendon, 498 U.S. 133 (1990) 23

International Paper Co. v. Ouellette, 479 U.S. 481 (1987) 23, 24

Italia Societea Per Asian Di Navigazione v. Oregon Stevedoring Co., 376 U.S. 315 (1964) 23

Kitts v. General Motors Corp., 875 F.2d 787 (10th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990) 18

Larsen v. General Motors, 391 F.2d 495 (8th Cir. 1968) 19

Medtronic, Inc. v. Lohr, 116 S.C. 2240 (1996) 23

Miranda v. Fridman, 647 A.2d 167 (N.J. Super. Ct. App. Div. 1994) 19

Montag v. Honda Motor Co., 75 F.3d 1414 (10th Cir.), *cert. denied*, 117 S. Ct. 61 (1996) .. 18

Morales v. Trans World Airlines, 504 U.S. 374 (1992) 24

Otis v. City of Chicago, 29 F.3d 1159 (7th Cir. 1994) 6

Paccar, Inc. v. National Highway Transportation Safety Act, 573 F.2d 632 (9th Cir. 1978) 10

Pennsylvania R.R. v. Puritan Coal Mining Co., 237 U.S. 121 (1915) 24

Perry v. Mercedes Benz, 957 F.2d 1257 (5th Cir. 1992) 19

Pokorny v. Ford Motor Co., 902 F.2d 1116 (3rd Cir.), *cert. denied*, 498 U.S. 853 (1990) . . . 18

Suzik v. Sea-Land Corp., 89 F.3d 345 (7th Cir. 1996) 6

Texas & Pacific R.R. v. Abilene Cotton Oil Company, 204 U.S. 426 (1907) 24

Wiley v. Volkswagen of America, Inc., 805 F.2d 394 (4th Cir. 1986) 5

Wood v. General Motors Corp., 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990) 18, 19, 25

Zimmerman v. Volkswagen of America, Inc., 920 P.2d 67 (1997) (Idaho 1996), *cert. denied* . . 18

Statutes, Regulations and Rules

15 U.S.C. § 1392(a), repealed and recodified as 49 U.S.C. § 30103(a) (1994) 12

15 U.S.C. § 1392(d), repealed and recodified as 49 U.S.C. § 30103(b) (1994) 2, 22

15 U.S.C. § 1397(k), repealed and recodified as 49 U.S.C. § 30103(e) (1994) 2

28 U.S.C. § 1254(1) (1997) 1

28 U.S.C. § 1332(a)(2) (1997) 1

28 U.S.C. § 1441(b) (1997) 1

49 U.S.C. § 30101 *et seq.* (1997) 3

735 Ill. Comp. Stat. 5/2-1009 (West 1994) 4

735 Ill. Comp. Stat. 5/13-217 (West 1994) 4

U.S. CONST. ART. VI, cl. 2 . . . . . 2, 11

49 C.F.R. § 571.212 (1987) ..... *passim*
U.S. Sup. Ct. R. 10 5
U.S. Sup. Ct. R. 10(a) 4, 5
U.S. Sup. Ct. R. 10(c) 4
U.S. Sup. Ct. R. 14.1(g) 6
U.S. Sup. Ct. R. 14.1(h) 6
U.S. Sup. Ct. R. 14.4 6
U.S. Sup. Ct. R. 15.2 6
Fed. R. Evid. 403 6
Fed. R. Evid. 702 6
34 Fed. Reg. 14,438 (1969) 13
37 Fed. Reg. 16,979 (1972) 14
39 Fed. Reg. 2274 (1974) 15
41 Fed. Reg. 36,493 (1976) 11, 15
42 Fed. Reg. 34,288 (1977) 11
42 Fed. Reg. 34,289 (1977) 11, 15

Miscellaneous:

Pub. L. No. 103-272, § i(e), 108 Stat. 943 3
W. PAGE KEETON, *et al.*, PROSSER AND KEETON ON THE LAW OF TORTS § 3075, 99 (5th ed. 1984) 23
RESTATEMENT (SECOND) OF TORTS § 282 (1965) ... 23
S. Rep. No. 89-1301 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709 26
H.R. Rep. No. 89-1776 (1966) 26

OPINIONS BELOW

The unreported memorandum opinion and order of the United States District Court for the Northern District of Illinois, Eastern Division, granting Volvo's motion for summary judgment based on federal preemption, is attached to Gracia's petition as Appendix B.

The Seventh Circuit Court of Appeals affirmed the judgment of the District Court on April 24, 1997. *Gracia v. Volvo Europa Truck, N.V.*, 112 F.3d 291 (7th Cir. 1997), a copy of which is attached to Gracia's petition as Appendix C.

No judge in active service on the Seventh Circuit requested a vote on *Gracia's* suggestion for rehearing *en banc*. All of the judges of the original Seventh Circuit panel voted to deny Gracia's petition for rehearing on June 10, 1997. The June 10, 1997 order of the Seventh Circuit denying said petition is attached as Appendix C-1.

STATEMENT OF JURISDICTION

Gracia seeks to invoke this Court's discretionary jurisdiction pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rules 10(a) and (c). The opinion of the Seventh Circuit was filed on April 24, 1997. The order of the Seventh Circuit denying Gracia's petition for rehearing and suggestion for rehearing *en banc* was entered on June 10, 1997. Gracia's petition for a writ of certiorari was docketed with this Court on November 18, 1997.

Gracia's claim when initially filed invoked the jurisdiction of the United States District Court for the Northern District of Illinois pursuant to 28 U.S.C. § 1332(a)(2) and 28 U.S.C. § 1441(b).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. U.S. CONST. ART. VI, cl.2. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

2. 15 U.S.C. § 1392(d), repealed and recodified as 49 U.S.C. § 30103(b) (1994) (hereinafter referred to as "the Safety Act"). Appendix A-4.

3. 15 U.S.C. § 1397(k), repealed and recodified as 49 U.S.C. § 30103(e) (1994) (hereinafter referred to as "the Safety Act"). Appendix A-4.

4. 49 C.F.R. § 571.212 (1987) (hereinafter referred to as "FMVSS 212" or "Safety Standard 212"). Because Gracia has failed to set forth Standard 212 in its entirety in her Appendix D, specifically excluding relevant portions of the application section, S3, Volvo attaches hereto Standard 212 in its entirety in Appendix A-1 to A-3.

BRIEF FOR THE RESPONDENT IN OPPOSITION

This case presents no compelling reason for this Court to exercise its discretionary jurisdiction and accept Gracia's petition. U.S. Sup.Ct.R. 10. The District Court and the Seventh Circuit followed and correctly applied the reasoning of this Court as set forth in *Freightliner Corporation v. Myrick*, 514 U.S. 280 (1995) and *Cipolone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), in deciding that Gracia's product liability action against Volvo based on an alleged defect in the design of a truck windshield retention system was preempted by the National Highway Transportation Safety Administration ("NHTSA"), and the National Traffic and Motor Vehicle Safety Act, ("Safety Act").[1] Appendix A-1 to A-3. The District Court and the Seventh Circuit correctly concluded that the NHTSA specifically and directly addressed Gracia's design defect allegations under Federal Motor Vehicle Safety Standard 212 ("FMVSS 212"), which standard concluded and determined for specific, articulated reasons that the subject truck should not be designed in the manner suggested by Gracia. Thus, Gracia's contention that there is no safety standard "in effect" regulating windshield retention in the subject truck is a misstatement of the applicable law and the underlying facts of this case. Contrary to Gracia's asser-

---

[1] In 1994, the Safety Act was recodified as 49 U.S.C. § 30101 *et seq*. Although the language of the statute has been technically modified in the recodification and reenactment, it was done "without substantive change." See Pub. L. No. 103-272, § i(e), 108 Stat. 943. The above quoted provision was the language in effect at all times relevant for purposes of this litigation.

tions, the District Court and the Seventh Circuit each closely analyzed the regulatory history and intent behind FMVSS 212, and correctly determined that the *Myrick* decision supported a finding of preemption under the facts of this case. Thus, there is no reason for this Court to accept Gracia's petition since it would not provide an opportunity to establish new law, nor would it provide clarification of existing law.

The District Court and the Seventh Circuit's rulings that Gracia's claim was preempted by FMVSS 212 is in accord with the great weight of authority and reasoning upholding federal preemption under the Safety Act. U.S. Sup.Ct. Rule 10(c). Gracia's petition, albeit reluctantly, acknowledges the weight and validity of this Court's prior authority, and makes no effort to challenge or distinguish those decisions. This Court has consistently refused to accept for review, lower court decisions upholding federal preemption of common law claims in derogation of safety standards, and should similarly now refuse to accept Gracia's petition seeking review of two lower court decisions upholding federal preemption of her alleged common law claims in derogation of FMVSS 212.

Contrary to representations in Gracia's petition, there is no conflict among the state courts of last resort or federal courts regarding federal preemption based on FMVSS 212. U.S. Sup.Ct. Rule 10(a). This safety standard was debated extensively by the NHTSA, and substantial technical evidence and commentary was compiled over eight years resulting in the current version of Standard 212. With the exception of the instant case, Gracia's petition fails to direct this court to a single reported decision previously addressing federal preemp-

tion and FMVSS 212, thus no conflict can possibly exist. The handful of state courts of last resort to reject preemption outright (which no federal circuit court has ever done) have addressed federal preemption under FMVSS 208, but none have addressed preemption under FMVSS 212. See fn. 2, *infra*, p. 18-19. Until a conflict between state or circuit courts arises, there is no reason for this Court to accept Gracia's petition to resolve a conflict which does not exist.

Other than the conclusory statement, Gracia's petition fails to demonstrate that the Seventh Circuit "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." U.S. Sup.Ct. Rule 10(a). At best, Gracia has merely demonstrated her dissatisfaction with lower court decisions interpreting existing precedent, a far cry from meeting her burden of establishing compelling reasons for this Court to accept her petition. U.S. Sup.Ct. Rule 10.

In addition to arguing that Gracia's claims were preempted by federal law, Volvo has continued to argue that it would be entitled to judgment in its favor as a matter of law for one or more of the following reasons:

1. Volvo was entitled to summary judgment because Gracia's liability expert would not have been qualified to testify based on Fed. R. Evid. 403 and 702, as well as *Daubert v. Merrill Dow Pharmaceutical, Inc.*, 509 U.S. 579 (1993) and its progeny. *See also, Wiley v. Volkswagen of America, Inc.*, 805 F.2d 394 (M.D. 1986);
2. Volvo was entitled to summary judgment since the condition of the vehicle where Gracia chose to sit

was open and obvious. *Clark v. Penn Versatile Van,* 554 N.E.2d 643 (Ill. App. 1990);

3. Volvo was entitled to summary judgment because the condition of the truck was not the proximate cause of the accident or injuries. *Cannon v. Commonwealth Edison,* 621 N.E.2d 52 (Ill. App. 1993); *Suzik v. Sea-Land Corp.*, 89 F.3d 345 (7th Cir. 1996); and
4. The District Court erred in granting Gracia's motion to re-instate her claim 30 months after the case was dismissed. 735 Ill. Comp. Stat. 5/2-1009 (1993); 735 Ill. Comp. Stat. 5/13-217 (1993); *Otis v. City of Chicago,* 29 F.3d 1159 (7th Cir. 1994).

Neither the District Court nor the Seventh Circuit Court of Appeals decided these additional arguments, concluding they became moot upon a finding that Gracia's claim was preempted by the NHTSA and FMVSS 212. Because Volvo would still be entitled to judgment in its favor regardless of a ruling based on preemption, granting the petition would not alter the relationship of the parties, and thus mitigates against this Court's acceptance of Gracia's petition.

Finally, this Court should deny Gracia's petition since her statement of the case contains legal conclusions, contentions and argument, and is not limited to a recitation of facts material to the question presented in violation of U.S. Sup.Ct. Rule 14.1.(g), (h). This Court should also deny Gracia's petition since her statement of the case contains factual and legal misstatements and misrepresentations which bear directly on the question presented if the petition is granted in violation of U.S. Sup.Ct. R. 14.4. U.S. Sup.Ct. R. 15.2. Respondent, therefore, submits the following statement of the case.

STATEMENT OF THE CASE

Volvo was sued by Nancy Gracia for personal injuries based upon a common law theory of negligence relating to the design and manufacture of the windshield retention system of a forward control truck in excess of 10,000 pounds. In the District Court Gracia sought a voluntary dismissal or a thirty day extension of time due to difficulties relating to securing liability experts. In response to Gracia's request, the District Court entered a conditional involuntary dismissal order. More than thirty months after the dismissal order was entered, and over Volvo's objections as to jurisdiction, the case was reinstated without Gracia having met the conditions of the dismissal order.

At the time the final pre-trial order was filed, Volvo filed various dispositive motions, including motions for summary judgment based upon legal proximate cause, the existence of an open and obvious condition, and lack of reliable liability expert testimony. Gracia never objected to Volvo's Rule 12(m) statement of uncontested facts. Judge Paul Plunkett reviewed all motions, recommendations and objections, and thereafter granted Volvo's motion for summary judgment based upon federal preemption. Gracia thereafter appealed and the Seventh Circuit Court of Appeals affirmed summary judgment in favor of Volvo based on federal preemption. Neither the District Court nor the Seventh Circuit decided any of Volvo's other dispositive motions.

Gracia was injured in a two vehicle collision when she was riding as a third passenger in the cab of a 1986 Volvo FE6/13 forward control truck (the "subject truck") which was equipped with two seats for two persons, and

was being operated by her co-employee on a Chicago expressway. A "forward control" type vehicle can be described as having the windshield of the cab installed above the flat front end of the vehicle's cab with the vehicle controls in the cab located above and forward of the engine. Appendix B-1. Thus, the windshield is essentially positioned directly above the front bumper. In contrast, the windshield in a traditional or conventional truck cab is located well behind and away from the bumper, and behind the engine compartment.

While in traffic, the subject truck in which Gracia was riding struck the rear of a scrap steel hauling truck. As a result of the collision, the A-Pillar (the driver's side corner of the vehicle where the windshield and the driver's side door mounting meet) was crushed rearward, also dislodging the driver's side front wheel and partially collapsing the roof. During the accident sequence, the windshield was dislodged as designed and fell to the pavement Appendix B-2.

At the moment of impact, Ms. Gracia was seated in an elevated position on a pillow over the hot engine cover between the two seats (often referred to as the "bonnet" or "doghouse") in the cab of the subject truck. The two installed seats in the cab were each equipped with restraint systems and were occupied by the driver and another passenger. Because there was no seat on the engine cover, it was not equipped with any seatbelt or other restraining device. As a result of the impact, Gracia was thrown forward and through the windshield opening, injuring her spine when she struck the pavement in front of the subject truck. The driver and the other passenger, both of whom were also unbelted, were

not ejected from the cab and neither received any serious injury.

Gracia returned to part-time employment approximately six months after the accident and a short time later returned to full time employment which she continues today with a new employer. She can walk, exercise, drive a car and experience other life endeavors without aids, but continues to suffer some residual disability.

The subject truck was imported into the United States as one of five similar trucks purchased by Ryder Truck Rental ("Ryder") for lease to Gracia's employer, Brook Furniture Rental ("Brook"). Appendix B-1. Gracia acknowledged that she was aware that the Volvo truck had only two seats, neither of which were over the engine cover, and that no seat belt was available for persons sitting between the two seats. Gracia also acknowledged that prior to and on the date of the accident, she was aware of the danger of injury in a motor vehicle accident if she was not wearing a seat belt, and of the danger of being ejected from the vehicle in the event of an accident.

In preparation for trial, Volvo retained experts who opined that: (1) the speed of the subject truck at the time of impact could not be completely ascertained, but was in excess of 30 m.p.h.; (2) that Gracia would have sustained as severe or even greater injury, including death, had the windshield been retained in place; and (3) that the windshield is specifically designed to dislodge as a means of escape in accidents due to the high probability of fire, and as the only means of escape or emergency extrication in the event of a roll-over which is a common truck accident scenario.

In preparation for trial, Gracia retained a liability expert who opined that the subject truck failed to comply with FMVSS 212 which regulated windshield retention requirements in the subject truck at the time of its design and manufacture.

Specifically, FMVSS 212 "establishes windshield retention requirements for motor vehicles during crashes." *49 C.F.R. §571.212 S1.* This standard was in effect at the time of the accident and when the subject truck was manufactured. Appendix A; *49 C.F.R. §571.212 S3.*

REASONS FOR DENYING THE PETITION

I.

The Seventh Circuit Followed and Correctly Applied *Myrick.*

Prior to *Myrick*, the propriety of FMVSS 121 was raised in *Paccar, Inc. v. NHTSA*, 573 F.2d 632 (9th Cir. 1978). The *Paccar* court suspended enforcement of FMVSS 121, finding that the NHTSA had neglected to consider the high failure rate of ABS (anti-lock braking systems) devices in making its final ruling. *Id. at 642.* Until the NHTSA compiled sufficient evidence to demonstrate that ABS would not create even greater dangers than it sought to avoid, the *Paccar* court ruled that the regulation was unenforceable. *Id. at 642.*

Gracia's claim that the Seventh Circuit's decision directly conflicts with the Supreme Court's decision in *Freightliner Corp. v. Myrick*, 514 U.S. 1055 (1995), and indirectly with *Paccar* is without merit. As recognized by the Seventh Circuit, the critical distinction between the instant case and *Myrick,* while yet applying the holding

in *Myrick,* is that the federal regulation under consideration in *Myrick* (FMVSS 121) was suspended by the court in *Paccar* until the NHTSA was able to compile sufficient evidence demonstrating that the use of ABS on tractors and trailers would not increase the probability of danger. *Paccar, Inc. v. NHTSA,* 573 F.2d 632 (9th Cir. 1978). In contrast, no court or agency has struck down or sought to repeal FMVSS 212 which relates to windshield retention.

The NHTSA specifically addressed windshield retention, conducted hearings, and compiled evidence on forward control trucks as it developed and refined FMVSS 212. This evidence is most clearly seen in Standard 212's application section and in the detailed regulatory history for this standard. After detailed notice and comment, the NHTSA concluded and determined for specific, articulated reasons that forward control trucks should not be designed with a permanently affixed windshield, which is Gracia's sole claim here, because such design would be "impracticable" and would affect other safety considerations in all forward control trucks. 42 Fed.Reg. 34,289 (1977); 41 Fed. Reg. 36,493 (1976). Thus, the method of windshield retention proposed by Gracia under state law would directly conflict with the agency's findings and conclusions under federal law. The present case therefore presents the affirmative agency decision contemplated by *Myrick*, not a reversal by a reviewing court questioning the validity of the agency's evidence and rule making process as seen in *Paccar*. U.S. Const. Art. VI, cl.2. Gracia's decision to continuously ignore this critical distinction demonstrates that it is Gracia, and not the Seventh Circuit or the District Court, who is blatantly misreading and misapplying the Supreme Court's decision in *Myrick*.

This Court in *Myrick* specifically addressed Gracia's argument that the absence of regulation automatically precludes a preemption analysis. Although the *Paccar* court ultimately ruled in favor of the plaintiffs on other grounds, this Court in *Myrick* rejected such an argument as evidenced by the following:

> Indeed, the lack of federal regulation did not result from an affirmative decision of agency officials to refrain from regulating air brakes. NHTSA did not decide that the minimum objective safety standard required by 15 U.S.C. §1392(a) should be the absence of all standards, both federal and state. Rather, the lack of a federal standard stemmed from the decision of a federal court that the agency had not compiled sufficient evidence to justify its regulations.

Myrick, 514 U.S. at 286-87.

The language of FMVSS 212 and its unambiguous statement of the NHTSA's position with regard to the same aspect of performance which Gracia herein seeks to regulate by her common law action against Volvo clearly demonstrates affirmative agency decision making. The NHTSA concluded and agreed for specific, articulated reasons that complete windshield retention in forward control vehicles was impracticable, and that other safety concerns were paramount to the danger of passenger ejection.

It is uncontroverted that the subject vehicle was a forward control vehicle within the meaning of FMVSS 212. It is also uncontroverted that the subject vehicle weighed over 10,000 pounds. Nonetheless, despite the NHTSA's testing and express statement of its determination that the windshields of forward control vehicles

cannot feasibly be bonded and should not be permanently affixed for safety reasons, Gracia argues that the windshield should have been bonded or permanently affixed. Gracia's argument is directly at odds with the Safety Act and Standard 212, and if allowed to proceed, will impermissibly subject forward control truck manufacturers like Volvo to windshield installation and retention on a state by state basis.

The regulatory history of FMVSS 212 strongly reinforces the Seventh Circuit's decision finding federal preemption, and is consistent with this Court's decision in *Myrick*. The original draft of FMVSS 212 applied only to passenger cars. 34 Fed.Reg. 14,438 (1969). In 1969, the NHTSA proposed to "include requirements for windshield retention for multi-purpose passenger vehicles, trucks, and buses. . . ." *Id.* In response to this proposal, and in compliance with the NHTSA's procedures, the Automobile Manufacturers Association, Inc. ("AMA") and others submitted comments on or about February 25, 1970, one entitled "Windshield and Forward-Facing Window Requirements, Docket No. 69-29; Notice 2." The AMA, after its own testing, came to the following conclusion: "We believe that countervailing arguments militate against the coverage of large trucks." *Id. at S70-3.3.*

Such counterveiling arguments included findings by the Cornell Aeronautical Laboratories that: (1) impact deformation of the windshield mounting surface in a study of 680 truck accidents was so severe that *no* level of windshield retention would be meaningful (citing "Trucks in Rural Injury Accidents," Cornell Aeronautical Laboratories Report No. VJ-2721-R5, July 1969); (2) that most accidents involving trucks occur with only one occupant, the driver; and (3) that the windshield opening

in heavier trucks could be utilized to escape from the vehicle following an accident such as in a situation where a truck comes to rest upon its side, a common occurrence in truck accidents. *Id. at S70-3.4.*

The AMA further commented that with regard to forward control type configurations, a "windshield retention standard would be of little or no value in serving to contain the occupant within the vehicle." *Id.* Forward control vehicles, "because of their unique characteristics, in many accidents involving these vehicles, almost instantaneously the windshield is contacted by the object struck or the impact results in substantial deformation of the mounting structure. In either event, specifying a windshield retention capability would be meaningless." *Id. at S70-3.5.*

Following consideration of substantial data and commentary, the NHTSA agreed to revise its 1969 version of Standard 212, concluding:

> It is recognized that forward control vehicles may have difficulty achieving windshield retention since objects impacted by the front of such a vehicle tend to either impact the windshield itself, or deform the windshield mounting. Recognizing this problem, the standard would not be applicable to forward control vehicles until September 1, 1978. *37 Fed.Reg. 16,979 (1972).*

In 1974, after five more years of deliberation and further review of authoritative material relating to windshield retention in forward control vehicles, and of vehicles over 10,000 pounds, the NHTSA made an affirmative decision that forward control vehicles should not be designed or manufactured so that the windshield is retained in the event of an accident. The NHTSA cited as

additional support for its decision that these types of vehicles have stiff frames which subject the truck's windshield to extreme torsional stress in the event of a collision. Again, the NHTSA acknowledged that the windshield of a forward control vehicle would likely be instantly contacted in a collision and unable to restrain passengers. *39 Fed.Reg. 2274 (1974).*

In 1976, after allowing further comment and consideration of materials relevant to windshield retention, the NHTSA again stated the rationale behind its decision not to impose a windshield retention standard which bonded or permanently affixed the windshield stating: "[F]orward control vehicles and open-body vehicles with fold-down windshields are excluded from the application of the standard because of the impracticability of conforming with the requirement." *41 Fed.Reg. 36,493 (1976).*

Finally, in 1977, after the proposed amendment to FMVSS 212 had been adopted in a modified form, the NHTSA again commented: "Open-body type" vehicles and "forward control" vehicles were excluded because of the impracticability of applying the barrier crash test to these vehicles. *42 Fed.Reg. 34,288, 34,289 (1977).*

The extensive agency fact-finding and review process that the NHTSA engaged in prior to promulgation of the current version of FMVSS 212 is exactly what this Court expected of the same agency before it drafted and then sought to enforce FMVSS 121 involving ABS. *Paccar*; *Myrick*. Gracia makes no effort to challenge the constitutionality or enforceability of FMVSS 212, and Volvo is unaware of any such challenges to Standard 212 since 1977. In accordance with FMVSS 212, due to crash-

worthiness and safety concerns for operators of forward control vehicles, the NHTSA has determined that windshields of forward control vehicles cannot and should not be permanently affixed as Gracia presents in her petition and relies upon for her claim.

Throughout this litigation, Gracia has chosen to ignore the NHTSA's specific, articulated findings in her attempt to impose a state, or for that matter, multiple state common law standards in direct conflict with FMVSS 212. Gracia's repeated attempts to characterize the history and findings of the NHTSA which culminated in the current version of FMVSS 212 as "non-regulation" or an absence of regulation ignores the language of the standard, as well as the reasons for the agency's decision all together. As the Seventh Circuit stated after carefully reviewing FMVSS 212 and its regulatory history:

> The district court correctly determined that Gracia's common law claim was preempted and stated that "there has been 'an affirmative decision by agency officials' that there should be no standard because the nature of the cab design on forward control vehicles makes compliance with the minimum standard set by FMVSS impracticable." (citation omitted) Allowing a state common law standard on windshield retention would, accordingly, be a standard that is not identical to the federal one. Therefore, we conclude that the NHTSA's explicit exclusion of forward control vehicles from having to meet any windshield retention requirements in Federal Safety Standard 212, along with the inapplicability of the standard to vehicles over 10,000 lbs., expressly preempts Gracia's state common law action.

Gracia v. Volvo Europa Truck, N.V., 112 F.2d 291, 297 (7th Cir. 1997).

Because the sound reasoning of this Court as set forth in *Myrick* clearly supports the Seventh Circuit's finding of federal preemption, and because this Court's decision in *Myrick* requires no further clarification, Gracia's petition should be denied.

II.

There Is No Conflict In The Lower Courts Over The Question Of Whether FMVSS 212 Preempts Windshield Retention Claims In Forward Control Trucks Over 10,000 Pounds.

Gracia fails in her attempt to establish that the Seventh Circuit's opinion is in conflict with other circuit courts or state courts of last resort. In fact, quite the opposite is true. In addition to the fact that the Seventh Circuit opinion in this case is the only reported decision ever addressing preemption under FMVSS 212, the "overwhelming majority" of the cases addressing preemption under the Safety Act have found preemption. *Cooper v. General Motors*, 1997 WL 751947 (Miss. 1997). In *Cooper*, as with most other airbag cases, the plaintiff alleged that an automobile was defective under state tort law because it was not equipped with an airbag. *Id.* The Mississippi Supreme Court held that FMVSS 208 preempted the plaintiff's claim under the Safety Act because FMVSS 208 had given the auto manufacturer the option of installing an airbag or a lap and shoulder belt with a warning system. Thus, the plaintiff's attempt to pursue a common law claim seeking to impose a duty on the manufacturer to install an airbag directly conflicted with FMVSS 208.

Like the claims involving FMVSS 208, this case presents a classic example of an attempt to impose a con-

flicting state standard. Here, Gracia's proposed common law standard would directly conflict with FMVSS 212 and its regulatory history, as well as the NHTSA's conclusions regarding windshield retention on forward control vehicles. Gracia's argument, if accepted, would create precedent for eliminating federal preemption in every instance, a result clearly not warranted under the unique and singular facts of this case.

Despite a wealth of authority adverse to Gracia's position, Gracia attempts to convince this Court that the Seventh Circuit has taken a minority position on federal preemption. In reality, there are more than 50 federal cases and more than 80 state cases finding preemption under the Safety Act. A few of the more significant cases finding preemption under the Safety Act are as follows: *Harris v. Ford Motor Co.*, 110 F.3d 1410 (9th Cir. 1997); *Montag v. Honda Motor Co.*, 75 F.3d 1414 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 61 (1996); *Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3rd Cir. 1990), *cert. denied*, 498 U.S. 853 (1990); *Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990); *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990). *Cooper v. General Motors Corp.*, 1997 WL 751947 (Miss. 1997); *Zimmerman v. Volkswagen of America, Inc.*, 920 P.2d 67 (Idaho 1996), *cert. denied*, 117 S. Ct. U.S. 1245 (1997).[2]

---

[2] None of the circuit court cases cited by Petitioner support her argument that there can be no preemption of common law claims under the Safety Act. Gracia Petition, pp. 15-16. *Doyle v. Volkswagenwerk AG*, 114 F.3d 1134, 1135 (11th Cir. 1997) (discussing answer to certified question on state law to Supreme Court of Georgia and remanding to district court); (continued...)

Some of the above decisions upheld express preemption [*see Harris v. Ford Motor Co.*, 110 F.3d 1410 (9th Cir. 1997)]; some upheld implied preemption [*see Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988)]; and some upheld *both* express and implied preemption. *Boyle v. Chrysler Corp.*, 501 N.W.2d 865 (Wis.Ct.App. 1993). As one court has stated, "almost every court finds preemption in one way or another." *Miranda v. Fridman*, 647 A.2d 167 (N.J. Super. A.D. 1994).

Gracia posits that all courts to have reached "this precise issue" have ruled against preemption citing *Attocknie v. Carpenter Manufacturing, Inc.*, 901 P.2d 221 (Okla. App. 1995) and *In Re: Ford Motor Company Bronco II Products Liability Litigation ("Bronco II")*, 909 F. Supp. 400 (E.D. LA. 1995). Petition, p. 9. A closer reading of these cases demonstrates that neither addresses preemption under FMVSS 212, and neither supports the arguments raised in Gracia's petition.

The reasoning of the court in *Bronco II* actually supports the Seventh Circuit decision below. In *Bronco II*, the purchasers of 1983-1990 model year Ford Bronco II

---

[2] (...continued)
Perry v. Mercedes Benz, 957 F.2d 1257 (5th Cir. 1992) (findings that the savings clause did *not* destroy preemption under the Safety Act); *Larson v. General Motors*, 391 F.2d 495 (8th Cir. 1968) (decision did not address preemption). The Eleventh Circuit's sole mention of the viability of preemption under the Safety Act in *Doyle*, which had not been ruled on by the district court, was a citation to its opinion in *Myrick*, which this court affirmed on other preemption grounds. *Myrick v. Freuhof Corp.*, 13 F.3d 1516 (11th Cir. 1994), affirmed in *Freightliner v. Myrick*, 514 U.S. 280, 115 S. Ct. 1483 (1995). Thus, the Eleventh Circuit's discussion of preemption in *Myrick* is mere dicta.

vehicles brought product liability actions against Ford alleging that the vehicles were unduly prone to rollover. Ford argued that the plaintiff's state law claims were preempted because of the NHTSA's failure to impose a uniform anti-rollover stability standard. Specifically, Ford contended that because the NHTSA decided that a consumer information regulation was the most cost-effective manner of handling the situation, rather than promulgating or expressing a conclusion about a stability standard, that state law claims were preempted. The court in *Bronco II* undertook an extensive examination of the relevant administrative history concerning the stability standard, and concluded that the plaintiff's claims were not preempted because the NHTSA had failed to compile sufficient evidence to render an informed decision on the issue. The *Bronco II* court stated: "Instead, the lack of a federal standard has resulted from the agency's decision that *it has not compiled sufficient evidence* at this time, from a cost-benefit perspective, to justify a singly uniform stability standard." *Bronco II*, 909 F. Supp. at 408. (Emphasis added.)

Unlike *Bronco II*, the present case demonstrates that the NHTSA compiled evidence over an 8 year period before it drafted the version of FMVSS 212 at issue. Thus, unlike *Paccar* where a safety standard was struck down, and *Bronco II* where the NHTSA never considered the implementation of a roll-over standard, the instant case demonstrates affirmative agency decision-making as it relates to windshield retention in forward control vehicles.

The decision in *Attocknie* also does not address FMVSS 212, nor does it conflict with the Seventh Circuit's

opinion herein. *Attocknie* was decided before this Court's decision in *Myrick,* and was based on the Oklahoma Appellate Court's interpretation of *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), an interpretation this Court later rejected in *Myrick*. Further, *Attocknie* did not present sufficient facts demonstrating affirmative agency decision-making.

Allowing Gracia to enforce her proposed state law windshield retention standard would place Volvo in an indefensible, impracticable and conflicting position of affixing truck windshields for use across state lines. There could be different standards imposed by each state or no standard at all, thus exposing Volvo to substantial risk of liability without knowing in advance the nature or extent of a state windshield retention standard until after one of its trucks was involved in an accident and it was sued in tort for a defect relating to windshield retention. Clearly, the Safety Act was never intended to impose such a burden on a motor vehicle manufacturer such as Volvo, nor should Gracia be allowed to impose such a burden by further prosecution of her claim against Volvo.

Accordingly, the District Court's and the Seventh Circuit's finding of express preemption of Gracia's claim against Volvo was correct and completely consistent with the reasoning of this Court as contained in *Myrick* and other decisions. The Seventh Circuit decision was based on a fair and reasonable reading of the Safety Act, and gave consideration to the NHTSA's conclusions and findings with regard to FMVSS 212. The Seventh Circuit would also have been correct had it found implied preemption under the facts of this case.

III.

The Petition Presents No Reason For This Court To Depart From Its Prior Decisions Holding That Common Law Claims Are Subject To Federal Preemption.

Gracia also contends that common law claims are "**NEVER**" preempted by the Safety Act. Petition, p. 17. Although Gracia's petition relies heavily on isolated and ambiguous comments by individual legislators and essentially ignores the express preemption clause of the Safety Act, the provisions of the Act and this Court's prior interpretation of such language is paramount.

The preemption provision of the Safety Act provides that when a federal motor vehicle safety standard is in effect, no state may establish or continue in effect "any safety standard" applicable to the same aspect of performance of motor vehicles or items of motor vehicle equipment unless the state standard is "identical" to the federal standard. 15 U.S.C. § 1392(d). Specifically, the express preemption provision states as follows:

> Whenever a Federal Motor Vehicle Safety Standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

15 U.S.C. §1392(d). Appendix A-4.

Established precedent of this Court holds that this language encompasses state common law to the same extent it encompasses state statutory and regulatory

law. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). The critical term, "standard," is, of course, the normal term referring to the common law duties imposed by tort law.[3] In *Cipollone*, this Court made it clear that similar language "easily" encompassed tort actions because "[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief." *Cipollone*, 505 U.S. at 521 (plurality opinion); *see also Cippollone,* 505 U.S. at 548-49 (Scalia, J., concurring in judgment in part and dissenting in part). In *CSX Transportation v. Easterwood*, this Court construed the phrase "law, rule, regulation, order, or standard," and readily concluded that common law duties "fall within the scope of these broad phrases." *CSX*, 507 U.S. 658, 663-64. Where common law standards address product safety, then they are "safety standards" in ordinary, accepted usage. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 114-15 (1987) (referring to state safety standards set by California product liability common law). *See also International Paper Company v. Ouellette*, 479 U.S. 481, 496 (1987) (noting the "possibility that [the defendant] will have to meet a number of different standards" if sued under different states common law); *Medtronic, Inc. v. Lohr*, 116 S. Ct. 2240, 2269 (Breyer, J. concurring in part and concurring in the judgment); *id.* at 2262 (O'Connor, J., with whom the Chief Justice, Justice Scalia and Justice Thomas joined, concurring in part and dissenting in part). Accordingly, the

---

[3] *See e.g.*, W. PAGE KEETON, *et al.*, PROSSER AND KEETON ON THE LAW OF TORTS § 3075, 99 (5th ed. 1984); RESTATEMENT (SECOND) OF TORTS § 282, (1965); *Ingersol Rand Company v. McClendon*, 498 U.S. 137, 142 (1990); *Italia Societea Per Azioni Di Navigazione v. Oregon Stevedoring Company*, 376 U.S. 315, 322-23 (1964).

Seventh Circuit correctly followed the established precedent of this Court when it concluded that the Safety Act preempted Petitioner's common law product liability design defect claim in this case. *Gracia*, 112 F.3d at 297.

Gracia's reliance on the savings clause set forth in 15 U.S.C. § 1397(k) is equally futile. The savings clause does not override the doctrine of federal preemption, nor does it preserve conflicting state safety standards. 15 U.S.C. § 1392(d). Appendix A-4. This Court would be inconsistent with its own precedent if it were to allow Gracia to pursue her claim in the face of affirmative agency action to regulate windshield retention in forward control trucks by allowing a common law claim to override the preemption clause of the Safety Act. Clearly the facts of this case do not warrant such drastic measures.

Gracia's novel interpretation of the Safety Act savings clause is also undercut by a number of prior decisions rejecting such an interpretation involving similar savings clauses. *Texas & Pacific Railroad v. Abilene Cotton Company*, 204 U.S. 426 (1907) (sweepings "savings" clause did not preserve state actions). In *Morales v. Transworld Airlines*, 504 U.S. 374 (1992), this Court directly ruled that general savings clause language did not authorize a state action so as to supersede an express preemption clause. *Accord, International Paper Company v. Ouellette*, 479 U.S. 481, 494 (1987). As noted by the Court in *Pennsylvania Railroad v. Puritan Coal Mining Company*, 237 U.S. 121 (1950), a savings clause "was added at the end of the statute, not to nullify other parts of the Act, or to defeat rights or remedies given by the preceding sections, but to preserve all existing rights which were not inconsistent with those created by the statute." There is no basis for a different conclusion in the instant case.

This Court's decision in *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993), also supports the Seventh Circuit's holding that Gracia's claims were expressly preempted in this case in spite of the Safety Act savings clause. In *CSX*, this Court held that expressed preemptive language is necessarily the best evidence of Congress' preemptive intent. 507 U.S. at 663-664. The Federal Railroad Safety Act ("FRSA"), like the Safety Act in this case, has both a preemption clause and a savings clause. *Id.* In *CSX*, this Court held that the FRSA expressly preempted any state requirement sought to be imposed on the defendant, including a requirement sought to be imposed by a common law negligence action. *Id.*

As the First Circuit also recognized in *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990), the language of the savings clause definitively is not the language commonly employed by Congress in savings clauses intended to restrict the scope of preemption. Rather, the "compliance with" language of the savings clause addresses a different issue—namely, the extent to which compliance with government statutes or regulations is a statutory or common law affirmative defense—a point that has not been raised as an issue in this case.

The above authority directly refutes Gracia's argument that the Safety Act savings clause magically preserves all claims, even where the claim runs afoul of express preemption or implied preemption. To conclude otherwise would allow states to establish individual windshield retention standards when a federal agency has determined that it would be impracticable, infeasible and dangerous for specific and articulated reasons to require retention

of windshields of forward control vehicles, including the subject vehicle.[4]

Gracia's reliance on the legislative history of the Safety Act also fails to support her position and fails to provide any basis for accepting her petition. There is one reference to "common law" in the Congressional reports' discussion of the preemption provision. The Senate Report, after stressing the need for uniformity, notes that states may set standards for their own procurements, but not conflicting standards and then explains: "Moreover, the federal minimum safety standards need not be interpreted as restricting state common law *standards of care*. Compliance with such standards of care would thus not necessarily shield any person from product liability at common law." S. Rep. No. 89-1301 at 12 (1966) (emphasis added). The use of the term "standard" in referring both to the federal standards and to common law duties confirms the natural meaning of "standard" in the Safety Act as including common law tort claims; so too does the very fact that the committee undertook to offer an explanation on the point. Nor does H.R. Rep. No. 89-1776 (1966), or the other legislative history of the Safety Act which Gracia relies on address the issue of federal preemption. In fact, none of the comments of any of the witnesses, senators, or congressmen debating the bill address the substantial issue of express preemption as

---

[4] The foregoing analysis of the savings clause is similarly applicable to implied preemption where a state law common law claim conflicts with federal law so as to frustrate the purpose of the federal law or to make it impossible to comply with both federal and state law. *Myrick*, 514 U.S. at 287 (conducting an implied preemption analysis under a NHTSA preemption argument).

provided by the Act; their comments merely paraphrase the savings clause language of the Act. *Gracia*, 112 F.3d at 298.

Gracia incorrectly reads the specific, express preemption provision out of the Safety Act in favor of the general "savings" provision which makes no reference to preemption. As stated earlier in part II, the overwhelming weight of authority rejects Gracia's argument that there is no preemption under the Safety Act. Further, the limited cases refusing to find preemption under the Safety Act have not addressed FMVSS 212 or the unique and specific facts of this case.

CONCLUSION

The subject case does not present a novel issue of law, it presents no conflict between federal or state courts requiring resolution by this Court, and would not result in any clarification of existing law so as to provide a basis for this Court's exercise of discretionary jurisdiction. The lower court decisions are well developed and conform with existing precedent. For each of these reasons and for the other reasons as discussed herein, this Court should deny Nancy Gracia's petition for a writ of certiorari.

Respectfully submitted,

WAYNE F. PLAZA
CHARLES A. LEMOINE
Counsel of Record
ROOKS, PITTS AND POUST
10 South Wacker Drive
Chicago, Illinois 60606

Attorneys for Respondent

APPENDICES

APPENDIX A

§ 571.212 Standard No. 212; Windshield Mounting.

S1. *Scope*. This standard establishes windshield retention requirements for motor vehicles during crashes.

S2. *Purpose*. The purpose of this standard is to reduce crash injuries and fatalities by providing for retention of the vehicle windshield during a crash, thereby utilizing fully the penetration-resistance and injury-avoidance properties of the windshield glazing material and preventing the ejection of occupants from the vehicle.

S3. *Application*. This standard applies to passenger cars, and to multi-purpose passenger vehicles, trucks, and buses having a gross vehicle weight rating of 10,000 pounds or less. However, it does not apply to forward control vehicles, walk-in van-type vehicles, or to open-body type vehicles with fold-down or removable windshields.

S4. *Definition*. "Passive restraint system" means a system meeting the occupant crash protection requirements of S5. of Standard No. 208 by means that require no action by vehicle occupants.

S5. *Requirements*. When the vehicle traveling longitudinally forward at any speed up to and including 30 mph impacts a fixed collision barrier that is perpendicular to the line of travel of the vehicle, under the conditions of S6, the windshield mounting of the vehicle shall retain not less than the minimum portion of the windshield periphery specified in S5.1 and S5.2.

S5.1 *Vehicles equipped with passive restraints*. Vehicles equipped with passive restraint systems shall retain

not less than 50 percent of the portion of the windshield periphery on each side of the vehicle longitudinal centerline.

S5.2 *Vehicles not equipped with passive restraints.* Vehicles not equipped with passive restraint systems shall retain not less than 75 percent of the windshield periphery.

S6. *Test conditions.* The requirements of S5. shall be met under the following conditions:

S6.1 The vehicle, including test devices and instrumentation, is loaded as follows:

(a) Except as specified in S6.2, a passenger car is loaded to its unloaded vehicle weight plus its cargo and luggage capacity weight, secured in the luggage area, plus a 50th-percentile test dummy as specified in Part 572 of this chapter at each front outboard designated seating position and at any other position whose protection system is required to be tested by a dummy under the provisions of Standard No. 208. Each dummy is restrained only by means that are installed for protection at its seating position.

(b) Except as specified in S6.2, a multipurpose passenger vehicle, truck, or bus is loaded to its unloaded vehicle weight, plus 300 pounds or its rated cargo and luggage capacity, whichever is less, secured to the vehicle, plus a 50th-percentile test dummy as specified in Part 572 of this chapter at each front outboard designated seating position and at any other position whose protection system is required to be tested

by a dummy under the provisions of Standard No. 208. Each dummy is restrained only by means that are installed for protection at its seating position. The load is distributed so that the weight on each axle as measured at the tire-ground interface is in proportion to its GAWR. If the weight on any axle when the vehicle is loaded to its unloaded vehicle weight plus dummy weight exceeds the axle's proportional share of the test weight, the remaining weight is placed so that the weight on the axle remains the same. For the purposes of this section, unloaded vehicle weight does not include the weight of work-performing accessories. Vehicles are tested to a maximum unloaded vehicle weight of 5,500 pounds.

S6.2 The fuel tank is filled to any level from 90 to 95 percent of capacity.

S6.3 The parking brake is disengaged and the transmission is in neutral.

S6.4 Tires are inflated to the vehicle manufacturer's specifications.

S6.5 The windshield mounting material and all vehicle components in direct contact with the mounting material are at any temperature between 15° F and 110° F.

STATUTES

15 U.S.C. § 1392(d), recodified without substantive change as 49 U.S.C. § 30103(b), provides:

> (d) Supremacy of federal standards; allowable higher standards for vehicles used by Federal or state governments.
>
> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.

15 U.S.C. § 1397(k), recodified without substantive change as 49 U.S.C. § 30103(e), provides:

> Compliance with any Federal motor safety standard issued under this subchapter does not exempt any person from any liability under common law.

APPENDIX B

1-Photograph of FE 6/13 - undamaged.

2-Photograph of Subject Truck - post accident.

BROOK
HOME &
OFFICE
BROOK
FURNITURE RENTAL
BROOK
FURNITURE RENTAL
BROOK
VOLVO
FEB

B-1

FURNITURE RENTA
93-0170

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 10, 1997.

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*

NANCY GRACIA,

Plaintiff-Appellant,

No. 96-2774 v.

VOLVO EUROPA TRUCK, N.V.,
a foreign corporation,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 87 C 10005—Paul E. Plunkett, *Judge*.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by plaintiff-appellant Nancy Gracia, no judge in active service has requested a vote thereon, and

all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing is DENIED.